

## CHAPTER 8 – FAILURE TO PROSECUTE, DISMISSALS AND WITHDRAWALS

### A. FAILURE TO PROSECUTE AND DISMISSAL BY THE COURT

#### **PROTOCOL 8-1**

If the plaintiff does not appear for the scheduled final hearing, the court should determine that appropriate notice was given to the plaintiff; and upon satisfying itself of this requirement, the case shall be dismissed for lack of prosecution. Said dismissal shall be with prejudice to the plaintiff's right to file a new petition based upon the same allegations except for good cause shown, but without prejudice as to any new allegations.

**NOTE:** The court may consider the facts alleged in the original filing as evidence of a history of abuse in any future proceedings.

#### **PROTOCOL 8-2**

In any case where an order or petition is dismissed, all parties and the law enforcement agencies that received copies of the earlier orders shall be notified.

**NOTE:** Police should be notified by a copy of the order that the dismissal was due to a failure to appear by the plaintiff.

#### **PROTOCOL 8-3**

If the plaintiff fails to meet his or her burden of proof at the time of the final hearing, the case will be dismissed with prejudice.

### B. WITHDRAWALS OF RESTRAINING ORDERS

A plaintiff can request a withdrawal of the Domestic Violence Petition at any time whether before or after the issuance of final orders.

#### **PROTOCOL 8-4**

Prior to the issuance of a final order, no petition should be allowed to be withdrawn except upon the personal appearance and written request of the plaintiff. Appropriate forms for this purpose shall be provided by the court.

#### **PROTOCOL 8-5**

The plaintiff should be asked to sign a statement requesting dismissal of the orders, and provide proof of identity (such as a driver's license). If the plaintiff is represented by counsel, counsel shall be notified of the plaintiff's request to vacate the order prior to any action by the court.

#### **PROTOCOL 8-6**

Where possible, the clerk should arrange for a face to face meeting where the judge should ascertain whether the request is voluntarily made. If possible, the judge who issued the order should be the one to address the request for the withdrawal. The court may act on the motion or schedule the motion for a hearing. The plaintiff should be reminded by the clerk that the orders remain in effect until vacated.

#### **PROTOCOL 8-7**

The court should ensure that the plaintiff has a safety plan in place prior to acting on the request for the withdrawal.

#### ***COMMENT***

When a request for dismissal is made, there is always a concern that a plaintiff is acting out of a fear of the defendant or as a result of a threat made by the defendant. While a plaintiff has an absolute right to withdraw the petition, the court should attempt to ensure that the plaintiff is not simply acting in response to coercion, fear or outside pressure. The court may refer the plaintiff to the local crisis center for assistance.

### **C. WITHDRAWAL AFTER ISSUANCE OF FINAL ORDERS**

#### **PROTOCOL 8-8**

Requests by the plaintiff to vacate orders already in effect should be handled in the same manner as Protocol 8-5 above.

### **PROTOCOL 8-9**

When a restraining order is vacated, withdrawn or modified, the clerk must notify the local law enforcement agency by transmitting a copy of the order forthwith to said agency. The clerk should follow the same transmittal protocol established for temporary orders. The clerk should also transmit the order to the Administrative Office of the Courts forthwith, via computer or facsimile, for entry into the Protective Order Registry and NCIC.